No. 17-130

In the Supreme Court of the United States

RAYMOND J. LUCIA, ET AL., PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR RESPONDENT SUPPORTING PETITIONERS

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REPLY BRIEF FOR RESPONDENT SUPPORTING PETITIONERS

The Commission's ALJs are "Officers of the United States" within the meaning of the Appointments Clause, U.S. Const. Art. II, § 2, Cl. 2, because they are not materially distinguishable from the special trial judges of the Tax Court, who were held to be inferior officers in *Freytag* v. *Commissioner*, 501 U.S. 868 (1991). The Commission's ALJs preside over formal hearings, create administrative records, make factual findings, draw legal conclusions, and determine liability and sanctions in the course of adjudicating disputes involving the primary conduct of private individuals. They then issue initial decisions interpreting and applying the law that, if not further reviewed, are "deemed the action of the Commission." 15 U.S.C. 78d-1(c). As in *Freytag*, these important powers constitute "significant authority pursuant to the laws of the United States." *Buckley* v. *Valeo*, 424 U.S. 1, 126 (1976) (per curiam).

The Court-appointed amicus curiae argues that a governmental official qualifies as a constitutional officer only if she "has been lawfully delegated authority to bind the government or third parties in her own name." Br. 23 (capitalization and emphasis omitted). In framing that test and applying it here, amicus commits two independent errors. First, although the power to bind the government or third parties on significant matters is sufficient for officer status when the official occupies a continuing position, see *Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 77, 87 (2007) (2007 OLC Mem.), the Commission's ALJs possess that power when they issue decisions in their own name and the Commission declines to review their decisions. Second, the power to bind is not always necessary for officer status. As *Freytag* holds, it is possible for an official to be a constitutional officer because he is vested with important and distinctively sovereign functions. 501 U.S. at 881-882; see 2007 OLC Mem. 77, 90-92.

In addition to addressing whether the ALJ in this case was constitutionally appointed, the Court should address whether the statutory restraints on removing that ALJ from office unconstitutionally impair the President's ability to faithfully execute the laws. That critical question, which is fairly encompassed within the question presented, is directly implicated by the conclusion that ALJs exercise significant governmental authority. And failing to address it here could leave a cloud of uncertainty hanging over countless administrative proceedings that will be conducted by the Commission and by other agencies throughout the government. The Court should decline to address, however, the premature question of whether, upon remand to the

Commission, aspects of the prior proceedings may be ratified by a properly appointed decision-maker. Petitioners' ratification arguments are, in any event, without merit.

A. The Commission's ALJs Are "Officers Of The United States" Under The Appointments Clause

1. The Commission's ALJs can bind the government and third parties on important matters

a. Amicus is correct that a constitutional office is one in which there has been vested by law "a portion of the sovereign powers of the federal government." 2007 OLC Mem. 77; see Gov't Br. 17; Floyd R. Mechem, *A Treatise on the Law of Public Offices and Officers* § 1, at 1-2 (1890) ("A public office is the right, authority and duty, created and conferred by law, by which for a given period * * * an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public."). The exercise of such vested sovereign power reflects "significant authority pursuant to the laws of the United States." *Buckley*, 424 U.S. at 126. That type of authority "primarily involve[s] binding the government or third parties for the benefit of the public, such as by administering, executing, or authoritatively interpreting the laws." 2007 OLC Mem. 77. As the Court explained in *Freytag*, "[e]ven if the duties of special trial judges * * * were not [so] significant" in other respects, they would nevertheless qualify as constitutional officers because of their authority to render final decisions in certain tax proceedings. 501 U.S. at 882.

The Commission's ALJs are vested with the authority to bind the government and third parties in signifi-

cant matters for the public benefit. Whenever the Commission declines to engage in de novo review of an ALJ's initial decision, that decision "shall, for all purposes, including appeal or review thereof, be deemed the action of the Commission." 15 U.S.C. 78d-1(c). Thus, an ALJ's decision binds the parties unless the Commission, as a matter of discretion in most cases, chooses to modify or reverse that decision. *Ibid.*; see 17 C.F.R. 201.411(b)(2) ("The Commission may decline to review" most categories of adjudications.). Those procedures of the Commission follow the general framework set forth in the Administrative Procedure Act (APA), which provides that when an ALJ "makes an initial decision, *that decision then becomes the decision of the agency without further proceedings* unless there is an appeal to, or review on motion of, the agency within time provided by rule." 5 U.S.C. 557(b) (emphasis added).

To be sure, when no party seeks further review or the Commission denies it, the Commission has adopted a policy that it will issue an order informing the parties that the ALJ's decision has become final. But the finality regulation itself makes clear that it is the ALJ's "[initial] decision" that "becomes final upon issuance of the order." 17 C.F.R. 201.360(d)(2). And a finality order likewise states that it is the ALJ's "initial decision" that "has become final." *E.g.*, U.S. SEC, *Finality Order* 1, (July 8, 2009), https://www.sec.gov/litigation/aljdec/2009/33-9050.pdf (capitalization altered). Nor could the Commission say otherwise. By statute, if the Commission does not grant review, the ALJ's initial decision is "deemed" to be "the action of the Commission." 15 U.S.C. 78d-1(c). The regulation and finality order merely confirm what the statute already provides: absent

merits review by the Commission, it is *the ALJ's decision* that constitutes the final, binding, and judicially reviewable decision in the matter.

Amicus argues (Br. 47) that Section 78d-1(c), which is the general statute governing delegations by the Commission, does not apply to ALJs' initial decisions, but he misunderstands the statutory scheme. Subsection (a) permits delegation from the Commission to ALJs of "any of its functions" other than rulemaking, which includes the power to issue decisions; Subsection (b) reserves to the Commission the right to review those decisions; and Subsection (c) provides that ALJs' decisions are deemed to be the final action of the Commission if it declines to review them. Section 78d-1(c) thus mirrors the general APA provision through which an ALJ's "initial decision * * * becomes the decision of the agency," 5 U.S.C. 557(b), and amicus offers no reason to suppose that Section 78d-1(c) has a different scope that excludes an ALJ's initial decision. The Commission sensibly issues a finality order to notify parties that it has elected to let the ALJ's initial decision stand, but by statute it remains the ALJ's decision—now final—that binds the parties and governs their obligations.

b. Amicus further argues (Br. 22, 32-34) that officer status requires the power to bind "in her own name rather than in the name of a superior officer." That has never been a test for officer status, and adopting it would elevate form over substance. In *Freytag*, the Court paid no attention to whether the special trial judges signed their opinions in their own name or on behalf of the Tax Court. Early revenue officers who made binding decisions subject to further administrative appeal, see 2007 OLC Mem. 96, would not have been deprived of officer status if Congress had simply provided

that they acted in the name of the Treasury Secretary. Similarly here, it does not matter whether ALJs issue initial decisions in their own name (though they do, see, *e.g.*, Pet. App. 237a) or whether those decisions are later "deemed" to be action of the Commission. 15 U.S.C. 78d-1(c). If that mattered, Congress could deem *all* action by an agency's officials to be action of the Department Head, thereby withdrawing from the scope of the Appointments Clause the selection of the agency's entire workforce. Permitting important governmental functions to be vested in unaccountable officials, so long as a statute or regulation "deems" a properly appointed officer responsible, would transform the Appointments Clause from a meaningful structural safeguard into a paper tiger.

Amicus alternatively describes the test as whether officials are "act[ing] only as agents of their superiors." Br. 33. That formulation comes closer to the relevant question—*i.e.*, whether an official has his own independent authority to bind the government or third parties on significant matters. Officials who bind the government or third parties only pursuant to instructions from, or under the close supervision of, higher-ranking officials might not be constitutional officers because they lack an independent power to bind. See *Freytag*, 501 U.S. at 881-882 (noting that special trial judges exercise "significant discretion" in their tasks); see also 2007 OLC Mem. 93 ("*Buckley* did rightly indicate that discretion in administering the laws typically will constitute the exercise of delegated sovereign authority, and therefore is of course relevant.").

Here, however, the office of an ALJ is expressly created by statute, see 5 U.S.C. 3105, and is vested by statute and regulation with the authority to adjudicate disputes and then issue decisions that become final if the

Commission does not review them. See pp. 3-5, *supra*. The fact that the Commission retains the right of discretionary review does not mean that ALJs lack important authority in their own right. See *Edmond* v. *United States*, 520 U.S. 651, 663-665 (1997). Amicus is therefore wrong to suggest that an ALJ has "no power in his own office." Br. 34. Moreover, amicus correctly does not dispute that, in adjudicating disputes and issuing decisions, the Commission's ALJs exercise "significant discretion." *Freytag*, 501 U.S. at 882. ALJs thus possess both significant authority and discretion in issuing decisions that can become final and that accordingly can bind the government and third parties.

Even under amicus's agency formulation, the Commission's ALJs are constitutional officers because they are not agents of the Commission in any relevant sense. A basic premise of agency law is that "[a] principal has the right to control the conduct of the agent with respect to matters entrusted to him." Restatement (Second) of Agency § 14 (1958); see Restatement (Third) of Agency § 1.01 cmt. f(1) (2006) (Third Restatement) (power of control includes the ability "[to] state[] what the agent shall or shall not do, in specific or general terms" and "to give interim instructions or directions to the agent"). Here, the Commission does not have that kind of power to direct ALJs in the performance of their functions. The Commission may instruct an ALJ to hold a hearing or make findings on specific issues (see Pet. App. 238a-243a), or the Commission may take over a proceeding at any time and perform the functions itself. But unlike the principal in an agency relationship, the Commission cannot direct its ALJs to make particular findings or draw certain legal conclusions. Its ALJs have their own decisional authority in those matters.

Finally, amicus notes that the First Congress authorized the selection, apparently outside the constraints of the Appointments Clause, of deputy marshals, deputy collectors, and deputy surveyors, all of whom "had substantial authority to impact the rights of nongovernmental parties." Br. 32-33. Amicus is correct that those deputy positions are not necessarily appointed by Department Heads, see, *e.g.*, 28 U.S.C. 561(f) (Director of the Marshals Service may appoint "such employees as are necessary"), and this Court has stated that deputy marshals are not constitutional officers. See *Steele* v. *United States*, 267 U.S. 505, 508 (1925) ("The deputy marshal is not in the constitutional sense an officer of the United States."). But amicus does not argue that—like ALJs—those deputies had their own statutory and regulatory grants of authority; could perform their functions without direction by their superiors; or could make decisions that would become final and binding absent discretionary review by those superiors. Amicus similarly relies (Br. 33-34) on various Executive Branch opinions concluding that certain subordinate officials or contractors are not constitutional officers, or decisions of this Court holding that particular officials were not officers as a statutory matter. See *Steele*, 267 U.S. at 507 (general prohibition agent); *United States* v. *Germaine*, 99 U.S. 508, 512 (1879) (civil surgeon). But amicus does not attempt to show that those officials had authority equivalent to the Commission's ALJs.

2. The Commission's ALJs also exercise significant authority apart from their authority to bind

a. Although amicus recognizes that "sovereign authority *primarily* consists" of the power to bind the government or third parties, Br. 23 (emphasis added),

he elsewhere argues (Br. 34-43) that such authority is necessary to be a constitutional officer. "Delegated sovereign authority," however, "also includes other activities of the Executive Branch concerning the public that * * * have long been understood to be sovereign functions." 2007 OLC Mem. 77. It is possible for an official to qualify as a constitutional officer because he performs distinctively sovereign and executive functions. *Ibid.* For instance, an individual occupies a constitutional office if he possesses "the authority to represent the United States to foreign nations or to command military force on behalf of the government." *Ibid.*; see *id.* at 90-92.

Amicus notes that those particular functions "are not implicated here," Br. 23 n.8, but they confirm the general principle that the category of persons who are constitutional officers (because they are vested with sovereign authority) is broader than amicus asserts. Such authority includes offices that, even if they do not confer the ability to bind the government or third parties on important matters, "nevertheless are within the 'executive Power' that Article II of the Constitution confers, functions in which no mere private party would be authorized to engage." 2007 OLC Mem. 90-91. When Congress and the Commission conferred on the agency's ALJs the power to execute the law by adjudicating disputes with private individuals and assessing liability and sanctions, they conferred on ALJs sovereign authority no less than that possessed by the special trial judges in *Freytag*. Executive adjudication is a traditional sovereign function just as is judicial adjudication. The Commission's ALJs—like the special trial judges—perform much (or in particular cases, all) of the important work of agency adjudications.

b. Indeed, *Freytag* holds as much. Amicus argues (Br. 35-38) that the result in *Freytag* did not turn on the significance of the functions performed by special trial judges, but rather on their "authority to bind the government and private parties, in at least two respects." Br. 36. First, amicus points (*ibid.*) to the authority of special trial judges to "enter binding final judgments in their own name in some circumstances," in particular their statutory authority to "render the decisions of the Tax Court [*i.e.*, final decisions] in declaratory judgment proceedings and limited-amount tax cases." *Freytag*, 501 U.S. at 882. Second, amicus relies on the power of special trial judges "to bind the government and private parties by 'enforcing compliance with discovery orders'" through contempt sanctions. Br. 36-37 (quoting *Freytag*, 501 U.S. at 881-882) (brackets omitted). Amicus is not explicating *Freytag* but rewriting it.

i. In finding special trial judges to be constitutional officers, *Freytag* did not principally rely on their authority to enter final judgments. To the contrary, the Court *rejected* the government's argument that "special trial judges may be deemed employees * * * because they lack authority to enter a final decision." 501 U.S. at 881. That argument, the Court explained, "ignores the significance of the duties and discretion that special trial judges possess" when issuing initial decisions. *Id.* at 881-882. To be sure, the Court went on to say in *Freytag* that "[e]ven if the duties of special trial judges * * * were not as significant as we * * * have found them to be," they would qualify as constitutional officers because of their authority to render final decisions in certain proceedings. *Id.* at 882. But the Court expressly couched that as an alternative basis for its holding, after

first determining that the special trial judges were officers based on the significance of their adjudicative duties in issuing initial decisions.

ii. *Freytag*'s primary rationale did not turn on special trial judges' authority to issue contempt orders. Rather, the Court emphasized four "important functions": the judges' powers "[to] take testimony, conduct trials, rule on the admissibility of evidence, and * * * enforce compliance with discovery orders." 501 U.S. at 881-882. Here, the Commission's ALJs have the same powers. They take testimony, 5 U.S.C. 556(c)(4); 17 C.F.R. 200.14(a)(4); conduct trials, 5 U.S.C. 556(c)(5); 17 C.F.R. 200.14(a)(5), 201.111(d); rule on the admissibility of evidence, 5 U.S.C. 556(c)(3); 17 C.F.R. 200.14(a)(3), 201.111(c), 201.326; enforce compliance with discovery orders, 17 C.F.R. 201.180(a); and perform all other duties necessary to preside over complex adjudications, see *Bandimere* v. *SEC*, 844 F.3d 1168, 1178 (10th Cir. 2016) (listing ALJ duties), petition for cert. pending, No. 17-475 (filed Sept. 29, 2017).

Freytag's listing of these four important functions did not even mention the contempt power expressly. At most, that was implicit in the fourth function of "enforc[ing] compliance with discovery orders." 501 U.S. at 882. The only explicit mention of the contempt power appeared later in the Court's opinion in the discussion regarding whether the Tax Court "exercises judicial, rather than executive, legislative, or administrative, power." *Id.* at 890-891; see *id.* at 891 (noting the authority of the Tax Court "to punish contempts by fine or imprisonment" under 26 U.S.C. 7456(c)). That discussion was relevant to the Court's conclusion that the Tax Court is a "Court[ ] of Law" under the Appointments Clause, U.S. Const. Art. II, § 2, Cl. 2, such that "the Chief Judge

of the Tax Court constitutionally [may] be vested by Congress with the power to appoint" the special trial judges. *Freytag*, 501 U.S. at 884; see *id.* at 882-892.

The question of the Tax Court's status was relevant only because this Court had already concluded, earlier in its decision, that special trial judges were constitutional officers. See *Freytag*, 501 U.S. at 882 ("Having concluded that the special trial judges are 'inferior Officers,' we consider the substantive aspect of petitioners' Appointments Clause challenge."). Indeed, in discussing the contempt power, the Court spoke only of *the Tax Court's* "authority to punish contempts," *id.* at 891, not the special trial judges' authority. It would be passing strange for *Freytag* to have held special trial judges to be constitutional officers based on the contempt power (as amicus suggests), yet not to have expressly mentioned their possession of that power.

That is especially so because the "power to enforce compliance with discovery orders" extends beyond contempt. *Freytag*, 501 U.S. at 882. For example, a special trial judge also had the power to "require the production before him of evidence upon all matters embraced within his assignment," as well as to "order[] the issuance of subpoenas, as may be necessary," under Tax Court Rule 181 (1979). See *Samuels, Kramer & Co.* v. *Commissioner*, 930 F.2d 975, 986 (2d Cir.) (finding special trial judges to be officers based on their "power to enforce compliance with discovery orders," but not mentioning contempt), cert. denied, 502 U.S. 957 (1991); see also *Freytag*, 501 U.S. at 881 ("We agree with * * * the Second Circuit."). The Commission's ALJs have similar document-production and subpoena powers. See 17 C.F.R. 201.111(b) and (c). Amicus offers no reason to

believe that the Court's reference to the "power to enforce compliance with discovery orders" was limited to the contempt power.[1]

c. There is no conflict between *Freytag* and other decisions of this Court. Amicus argues (Br. 25) that under *INS* v. *Chadha*, 462 U.S. 919 (1983), a constitutional officer must take "action that ha[s] the purpose and effect of altering the legal rights, duties, and relations of persons." *Id.* at 952. But the Court used that phrase to describe *legislative* power, explaining that the power of the House of Representatives to pass a resolution overriding an Executive Branch decision was "essentially legislative in purpose and effect." *Ibid.* Amicus also relies (Br. 28-31) on other decisions of this Court in which government officials who had the power to issue binding decisions were described as, or were held to be, "officers." Those decisions had no occasion to consider, and accordingly did not address, whether the power to bind the government or private parties is *necessary* to officer status. And as amicus agrees, this Court's early Appointments Clause decisions were primarily concerned with whether Congress intended to create an "office," not whether the functions of the position were so significant that the Constitution required as much. Br. 29 (citation omitted). In sum, amicus identifies no decision of this Court—before or after *Freytag*—in which an official was vested with significant governmental authority,

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[1] Amicus correctly notes that a special trial judge's factual findings were "presumed to be correct" when reviewed by a Tax Court judge. Br. 38 n.11 (quoting T.C. R. 183(d) (2005)). But this aspect of Tax Court procedure was not a basis for the Court's Appointments Clause ruling, see *Freytag*, 501 U.S. at 874 n.3, even though it had been discussed at oral argument, Tr. at 33-41, *Freytag*, *supra* (No. 90-762).

and yet was held not to be a constitutional officer because he lacked the power to bind.

d. Amicus incorrectly argues that adhering to *Freytag* would require appointment of "every government attorney, investigator, and law-enforcement officer." Br. 38. The special trial judges in *Freytag* were constitutional officers not because their functions were significant in some colloquial sense, but because they had been authorized by statute to exercise distinctively sovereign power—namely, the power to shape formal adversarial proceedings instituted to impose civil liability on private individuals (in *Freytag*, as much as $1.5 billion, see 501 U.S. at 871 & n.1). And amicus does not argue that the Commission's ALJs can be instructed how to exercise their judgment in hearing and deciding their cases any more than could the special trial judges. As a matter of both the importance of their functions and their independent discretion in exercising them, amicus fails to show that the Commission's ALJs are analogous to all governmental officials who assist in law enforcement.

Amicus is similarly incorrect that, if the Commission's ALJs are held to be officers, it would "call into significant doubt" the practice of establishing federal investigatory and advisory commissions whose members are not appointed under the Appointments Clause. Br. 39. Some investigatory and advisory commissions may "issue subpoenas, administer oaths, collect documents, and call and examine witnesses." *Ibid.* But such commissions "cannot, in the absence of any other power, use the information to *do* anything." *Proposed Legislation to Grant Additional Power to the President's Commission on Organized Crime*, 7 Op. O.L.C. 128, 130 (1983). They cannot, for instance, "enact or execute a

law, *adjudicate a dispute*, or otherwise 'take any affirmative action which will affect an individual's rights,'" and their actions accordingly are not backed by any "coercive power." *Ibid.* (emphasis added; citation omitted); see 2007 OLC Mem. 85 & n.5, 98.

The Commission's ALJs, by contrast, use the information gathered during a hearing to adjudicate charges against a private person: They create the record, make factual findings, draw legal conclusions, and issue initial decisions on whether to impose sanctions that will be reviewed by the agency. The Commission's ALJs do not occupy a "purely advisory position," "one having no legal authority." 2007 OLC Mem. 77. To the contrary, they perform extremely important functions in service of executing the Nation's securities laws. And, conversely, if any of amicus's investigatory and advisory commissions were to depart from a purely advisory role, it would be exercising "significant authority" for purposes of the Appointments Clause, *Buckley*, 424 U.S. at 126, and its members would be constitutional officers who would require appointment in accordance with that Clause. See Office of Legal Counsel, *Constitutionality of the Ronald Reagan Centennial Commission Act of 2009*, 2009 WL 2810453, at *2 (Apr. 21, 2009); see also *id.* at *4 (proposing corrective measure to limit the Centennial Commission to "giving advice and making recommendations with respect to planning, developing and carrying out commemorative activities").

B. This Court Should Address The Constitutionality Of The Statutory Removal Restrictions For ALJs

As explained in our opening brief (at 39 & n.7), the question whether ALJs exercise significant authority, of the type that can only be exercised by constitutional

officers, naturally implicates the question whether statutory restrictions on removing them from office are permissible. Removal authority derives in part from the Appointments Clause, under "the well approved principle of constitutional and statutory construction that the power of removal of executive officers was incident to the power of appointment." *Myers* v. *United States*, 272 U.S. 52, 119 (1926). The removal issue is thus fairly encompassed within the question whether the Commission's ALJs are "Officers of the United States within the meaning of the Appointments Clause," Pet. Br. i, because answering in the affirmative entails remedial consequences in this case for both appointment *and* removal of the Commission's ALJs.

The proper remedy, should the Court agree that the Commission's ALJs are officers, would depend on whether the ALJ who presided in petitioners' case was subject to removal in conformance with constitutional constraints. Absent a ruling on the removal issue by this Court, the Court could remand to the agency for further proceedings before a properly appointed ALJ, only for petitioners to claim that the ALJ is unconstitutionally insulated from Presidential oversight. Indeed, petitioners want precisely that second bite at the apple in the event that the Commission pursues further proceedings. The public interest, however, strongly favors resolving the removal question now, to avoid the potential for a prolonged period of uncertainty surrounding the constitutionality of adversarial administrative proceedings conducted by the many agencies throughout the government in which ALJs preside.

Although neither petitioners nor amicus squarely addresses the issue, petitioners hint at their view that the Commission's ALJs are insulated from removal by

"one (or two) more" layers of legal protection "than the separation of powers will tolerate." Pet. Br. 38. Petitioners' suggestion, however, does not take account of the particular *type* of removal protection at issue. As the government previously explained (Br. 51-53), when the statutory restriction that permits removing ALJs "only for good cause established and determined by the Merit Systems Protection Board," 5 U.S.C. 7521(a), is properly construed—*i.e.*, to allow removal of an ALJ for failure to perform adequately or to follow agency policies, and to confine the Board's role to determining whether a factual basis exists for the agency's proffered grounds—Section 7521 affords a constitutionally sufficient degree of accountability and Executive Branch control in this case. This Court should adopt that construction in order to provide necessary clarity that Section 7521 leaves agency heads with constitutionally adequate authority to ensure that ALJs faithfully execute the law.

C. The Case Should Be Remanded To The Commission For Further Proceedings

Petitioners contend (Br. 49-57) that the proper disposition of this case is to direct dismissal of the proceedings against them. But the appropriate remedy for an Appointments Clause violation is a remand so that the government may proceed, if it chooses to do so, before a properly appointed officer. See, *e.g.*, *Ryder* v. *United States*, 515 U.S. 177, 188 (1995); *Intercollegiate Broad. Sys., Inc.* v. *Copyright Royalty Bd.*, 796 F.3d 111, 115-116 (D.C. Cir. 2015); cf. *Nguyen* v. *United States*, 539 U.S. 69, 83 (2003) (ordering remand due to improperly constituted court of appeals panel). Should this Court reverse the decision below on Appointments Clause grounds, it should order the court of appeals to remand

the case to the Commission, which may proceed by taking action itself or by assigning the matter to a properly appointed ALJ. See 15 U.S.C. 78d-1(a), 80b-3(e), (f), and (k). Under either option, those further proceedings would be conducted in conformance with the Appointments Clause. Although petitioners object to a potential ratification of the ALJ's actions on remand, that objection is both premature and meritless in any event.

1. On November 30, 2017, the Commission ratified the appointment of its ALJs, including the ALJ who presided in petitioners' case. See Gov't Br. 3 n.2. Petitioners ask this Court (Br. 51-53) to rule that the Commission's ratification order is invalid. That request is premature, however, because the government does not contend that the ratification order alone cured the Appointments Clause violation in this case. Neither the Commission nor the ALJ who presided despite his unconstitutional appointment has taken any action to remedy that deficiency in this particular proceeding. See Gov't Br. 3 n.2. The Court therefore should not opine on the legality of an order that has not been applied to petitioners. After the case has been remanded to the Commission, petitioners would be free to press their ratification argument in the normal course—that is, *if* the Commission chooses on remand to proceed before a ratified ALJ, and *if* that ALJ rules against petitioners. If, however, the Commission orders a new hearing before a newly appointed ALJ, or conducts the hearing itself in the first instance, petitioners' ratification challenge will be immaterial—and thus they cannot possibly be entitled to dismissal on that basis at this stage.

Petitioners are also mistaken in arguing (Br. 53) that the Commission "forfeited" its opportunity to ratify by failing to argue harmless error or ratification in the

court of appeals. Most obviously, proceedings in the court of appeals *predated* issuance of the ratification order. And even if the timing had been otherwise, arguing ratification would have been premature before the court of appeals, because the government does not contend that ratifying the ALJ's appointment alone cured the existing Appointments Clause violation in this case. The government contends only that a remand should be permitted for future proceedings before a properly appointed ALJ (or the Commission itself).

2. Petitioners' criticisms of the Commission's ratification order are, in any event, without merit. Ratification is the "adoption and affirmance by one person of an act which another, without authority, has previously assumed to do for him." 1 Floyd R. Mechem, *A Treatise on the Law of Agency* § 347, at 260 (2d ed. 1914). If an agent performs a "previous[ly] unauthorized" act on behalf of a principal, the principal or a properly authorized agent can ratify that act, at a minimum, where the principal (1) has authority to perform the act at the time of ratification and (2) had authority to perform the act at the time the agent acted. *Id.* § 354, at 263; see *FEC* v. *NRA Political Victory Fund*, 513 U.S. 88, 98 (1994); *United States* v. *Heinszen & Co.*, 206 U.S. 370, 382 (1907); see also Third Restatement § 4.04(1) & cmt. b. Under those criteria, the Commission has the power to ratify its ALJs' appointments. The previous hiring of the Commission's ALJs by the Chief ALJ was done on behalf of the Commission. See 5 U.S.C. 3105 ("Each agency shall appoint as many administrative law judges as are necessary."); APA § 11, 60 Stat. 244 (ALJs "shall be appointed by and for each agency."). And as the Head of a Department, the Commission had authority to appoint inferior officers, both at the time of the ALJ's

original selection and at the time of the Commission's ratification order. See *Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 511 (2010).

A similar procedure was endorsed by this Court following invalidation of the appointments at issue in *Ryder*, on which petitioners rely (Br. 43-45). There, before the Court held that the civilian judges of the Coast Guard Court of Appeals were inferior officers who had not been properly appointed, the Secretary of Transportation cured the error by ratifying the judges' previous appointments and "adopting" them "as judicial appointments of [his] own." *Edmond*, 520 U.S. at 654. When this Court reviewed decisions rendered by those judges, it held that their appointments were proper. *Id.* at 666. Other courts have upheld similar ratifications following constitutional challenges, including under the Appointments Clause. See, *e.g.*, *CFPB* v. *Gordon*, 819 F.3d 1179, 1190-1192 (9th Cir. 2016), cert. denied, 137 S. Ct. 2291 (2017); *Intercollegiate Broad.*, 796 F.3d at 115-116, 118-119; *Doolin Sec. Sav. Bank, F.S.B.* v. *Office of Thrift Supervision*, 139 F.3d 203, 212-214 (D.C. Cir. 1998); *FEC* v. *Legi-Tech, Inc.*, 75 F.3d 704, 709 (D.C. Cir. 1996).

Petitioners' anti-ratification argument rests on the mistaken premise that, because the Commission's Chief ALJ was not authorized to appoint inferior officers as an original matter, the Commission may not ratify those appointments after the fact. But there would be no need to ratify the appointments if they had been proper in the first instance; the very purpose of ratification is to retroactively authorize what previously had been unauthorized. Thus, when a governmental official "could have authorized" an act in the first instance, ratification permits the subsequent adoption of the act "with the

same effect as though it had been properly done under a previous authority." *A Treatise on the Law of Public Offices and Officers* § 535, at 349-350 (quoting *State* v. *Torinus*, 49 N.W. 259, 259-260 (Minn. 1879)).

Here, there can be no doubt that the Commission could have voted to approve, or itself performed, the ALJs' original hiring and appointment at that time. See *United States* v. *Hartwell*, 73 U.S. (6 Wall.) 385, 393-394 (1868) (defendant's appointment by the assistant treasurer, "with the approbation of the Secretary of the Treasury," was consistent with the Appointments Clause). For similar reasons, a properly appointed ALJ may choose to ratify his or her own previous acts, or those of another ALJ, which had been unauthorized when taken due to the original defect in the ALJ's appointment. See *A Treatise on he Law of Agency* § 374, at 274 (one agent's unauthorized act may be ratified by an agent of the same principal who has the "general power to do himself the act which he ratifies") (citation omitted); see *CFPB*, 819 F.3d at 1185-1186, 1190-1192; *Doolin Sec. Sav. Bank*, 139 F.3d at 205-206, 212-214. If the Court chooses to address petitioners' ratification argument, therefore, the Court should reject it.[2]

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[2] Petitioners also suggest (Br. 50-51) that any further action by the Commission's ALJs would be invalid because they have not received presidential commissions and have not taken oaths of office. Petitioners offer no support for their assertion that the ALJs failed to take an oath of office, which is standard for federal officials. See 5 U.S.C. 3331. And this Court has recognized that a commission is not a constitutional prerequisite to a validly appointed officer's exercise of his powers. See *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 156 (1803) ("[I]f an appointment was to be evidenced by any public act, other than the commission, the performance of such public act would create the officer; and * * * [would] enable him to perform the duties without [the commission].").

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed and the case remanded for further proceedings before the Commission.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

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